No. 86-80

In The
# Supreme Court of the United States
October Term, 1986

THE PEOPLE OF THE STATE OF NEW YORK,
*Petitioner,*

— against —

JOSEPH BURGER,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK**

## BRIEF FOR RESPONDENT

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## COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York Vehicle and Traffic Law § 415-a and New York City Charter § 436, authoritatively construed by the New York Court of Appeals as authorizing general warrantless searches by police officers, rather than to assure compliance with a valid, comprehensive, regulatory scheme, are violative of the Fourth Amendment's guarantee against unreasonable searches and seizures.

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## COUNTERSTATEMENT OF THE CASE

Respondent is content to rely upon the factual findings adopted by the Court of Appeals, which are binding on this Court in any event. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland R. Co. v. Railroad Comm.*, 229 U.S. 397, 412 (1913). It is necessary, however, to pinpoint two inaccuracies set forth in Petitioner's statement of the case.

1. Petitioner concedes, at p. 30 of its brief, that the *immediate purpose* of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property, a concession also contained in its State brief and quoted by the New York State Court of Appeals in its opinion. Moreover, consistent with that concession, the only police witness to testify at the suppression hearing, John Vega, described the police intrusion onto respondent's premises as simply "an inspection", presumably because he had "no idea" how those premises had been targeted for such intrusion and also admitted that neither of the two administrative agencies within whose purview the enforcement of the administrative statutes under review would lie, or, for that matter, any other administrative agency, had been contacted before the foray was undertaken.

Therefore, petitioner's characterization of the police action as "a *routine* warrantless inspection" leaves the inaccurate and misleading impression that it was a *routine* warrantless *administrative* inspection. (emphasis supplied)

2. Petitioner states that, "The Auto Crime Division was charged with the enforcement of VTL § 415-a", but

the statute itself, in pertinent part—[5.(a)]—merely talks in terms of authorizing "any police officer" to examine records and inventory.

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## SUMMARY OF ARGUMENT

The constitutional protections against unreasonable searches and seizures are applicable to commercial premises. Although administrative inspections conducted at such premises may be conducted on the basis of an administrative warrant, issued on a less than probable cause standard, certain "pervasively regulated" industries may be subjected to warrantless administrative inspections, where the commercial premises are part of the pervasively regulated industry and the search itself is part of a regulatory scheme designed to further an urgent state interest.

The auto parts industry does not possess the same type of history of regulation found in the liquor and firearms industries in which the Court has upheld warrantless administrative search schemes. Moreover, the statutes at issue authorize searches that are not limited in time, place and scope to insure compliance with a valid administrative scheme. Rather, they confer upon police officers. not administrative agents, the power to conduct warrantless searches for Penal Law violations, not to insure licensing requirements, and vest such police officers with unbridled discretion as to whether, when, where and why a warrantless search should be conducted, with no limitation as to frequency or duration. That the sole purpose of the warrantless search was to uncover criminal evidence has been



conceded by the People, both in the Court of Appeals and in this Court. The New York Court of Appeals so construed the statutes. Accordingly, the New York Court of Appeals properly held that the New York statutes at issue are violative of the Fourth Amendment to the United States Constitution.

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## ARGUMENT

Administrative inspections of private commercial property are, of course, subject to the constitutional prohibitions against unreasonable searches and seizures. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967). Warrants are generally required for most administrative searches, though they need not meet the stringent standard of "probable cause" in the criminal sense. *Marshall v. Barlow's, Inc.*, 436 U.S., at 320-321, *supra*. One engaged in an industry subject to a long-standing complex and pervasive pattern of "close supervision and inspection", *Colonnade Corp. v. United States*, 397 U.S. 72, 77 (1970), however, possesses a substantially diminished expectation of privacy and "this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections". *Donovan v. Dewey*, 452 U.S. 594, 599 (1982); *see, e.g. United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp. v. United States*, *supra* (liquor).

Warrantless inspection schemes, however, have been sustained only in "certain carefully defined classes of cases" *Michigan v. Clifford,* 464 U.S. 287, 292, n.2 (1984), involving industries which have a history of being "pervasively regulated", *Donovan v. Dewey, supra.* Thus far, only the mining industry, *Donovan v. Dewey, supra,* firearms dealers, *United States v. Biswell, supra,* and the liquor industry, *Colonnade Catering Corp. v. United States, supra,* have been found by this Court to be within the ambit of such "pervasive regulation". As the Court observed in *Marshall v. Barlow's, Inc.,* 436 U.S., at 313, *supra,* "the clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception". rejecting the effort by the Government to "make it the rule".

Even then, in order to sustain a warrantless administrative search, the search itself must be part of a regulatory scheme designed to further an urgent state interest, and warrantless inspections must be essential to the scheme. *Donovan v. Dewey,* 452 U.S. at 600, 602-603, *supra; United States v. Biswell,* 406 U.S. at 316, *supra.* Further, the regulatory scheme must "provide[ ] an adequate substitute for a warrant in terms of the certainty and regularity of its application". *Donovan v. Dewey, supra,* at 603. In order to "satisfy 'the certainty and regularity' requirement, the inspection program must define clearly what is to be searched, who can be searched and the frequency of such searches". *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072, 1077 (7th Cir. 1983). Finally, valid administrative searches must be distinguished from searches that are undertaken to obtain evidence of criminality. *Donovan v. Dewey, supra,* at 598, n.6;



*Camara v. Municipal Court,* 387 U.S. 523, 535, *supra.* An administrative search which is designed to unearth evidence of crime, rather than to serve an administrative purpose, must comport with traditional Fourth Amendment standards. *Donovan v. Dewey,* 452 U.S. at 598, n.6, *supra; Michigan v. Tyler,* 436 U.S. 499, 504-506, 512 (1978); *United States v. Lawson,* 502 F.Supp. 158, 165 (D.Md. 1980); *Commonwealth v. Lipomi,* 385 Mass. 370, 432 N.E. 2d 86, 91 (1982); Hall, Search & Seizure. § 11:8.

Examination of the statutes under review establishes that none of the criteria identified by this Court as a prerequisite to the validity of a warrantless inspection scheme have been met, and the Court of Appeals properly found the statutes at issue violative of the Fourth Amendment[1]. Point I of this brief explains why the pervasive regulation theory can have no application to the automobile parts industry. In Point II, respondent urges that the statutes at issue do not provide an adequate substitute for a warrant. Finally, in Point III, respondent argues that the statutes are not administrative in nature, but are designed solely to uncover evidence of criminality.

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[1]The Court of Appeals did not reach other state law issues in light of this holding. Thus, should this Court disagree with respondent's arguments, the matter would have to be remanded to the New York Court of Appeals for further proceedings.

## I. VEHICLE DISMANTLERS AND PARTS DEALERS ARE NOT ENGAGED IN THE TYPE OF PERVASIVELY REGULATED INDUSTRY WHICH HAS BEEN HELD BY THIS COURT TO RENDER A WARRANT REQUIREMENT SUPERFLUOUS.

In *Colonnade Corp. v. United States*, 397 U.S. 72, 75-77 (1970), this Court pointed to the "long history of the regulation of the liquor industry" which rendered the warrant requirement inapplicable to searches conducted to determine whether liquor bottles had been refilled or altered. Although Federal firearms regulation was "not as deeply rooted in history as is governmental control of the liquor industry", the Court sustained the warrantless administrative inspection statute passed by Congress based on the necessity for "close scrutiny of this traffic * * * to prevent violent crime and to assist the States in regulating the firearms traffic within their borders". *United States v. Biswell*, 406 U.S. 311, 315 (1972).

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978), however, the Court returned to the historical predicate. "The element that distinguishes these enterprises [referring to *Colonnade* (liquor) and *Biswell* (firearms)] is a long tradition of close government supervision of which any person who chooses to enter such a business must already be aware". *Ibid.* More important, the Court emphasized,

> "The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception." *Ibid.*

*Donovan v. Dewey*, 452 U.S. 599 (1982) also emphasized the importance of an industry's regulatory past. In



upholding a provision of a federal mine safety statute which authorized warrantless inspections, the Court observed that a "warrant may not be constitutionally required when Congress has reasonably demonstrated that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes". *Id.* at 600. The Court explained that although "the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make a warrant requirement unnecessary", the length of regulation is not the only criterion. *Id.* at 606.

Several courts have viewed the automobile parts industry as pervasively regulated. *E.g. People v. Easley*, 90 Cal. App.3d 440, 153 Cal. Rptr. 396, *cert. denied*, 444 U.S. 899 (1979); *Bludworth v. Arcuri*, 416 So.2d 882 (Fla. App. 4th Dist. 1982); *Lewis v. McMasters*, 663 F.2d 954 (9th Cir. 1981); *but see, State v. Galio*, 92 N.M. 266, 587 P.2d 44 (Ct. App. 1978), *cert. denied*, 92 N.M. 260, 586 P.2d 1089 (1978); *State v. Sidebotham*, 124 N.H. 682, 474 A.2d 1377 (1984). They have tended to focus on the automobile generally, looking to licensing and registration requirements. That, however, has not been deemed sufficient to authorize the random stopping of motorists to examine operator licenses and registrations, even though such a stop is administrative in character. *See, Delaware v. Prouse*, 440 U.S. 648 (1979).

Similarly, a warrantless inspection scheme cannot be validated on the theory that obtaining a license operates as an implied consent to surrender of Fourth Amendment rights. Recent decisions reject that approach, which some courts had found support for in *Zap v. United States,* 328 U.S. 624 (1946). *See, Spevack v. Klein,* 385 U.S. 511 (1967); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Matter of Finn's Liquor Shop v. State Liq. Auth.,* 24 N.Y.2d 647, 658, 249 N.E.2d 440, 445 (Fuld, Ch.J.), *cert. denied,* 396 U.S. 840 (1969). So, too, the analysis in *Donovan v. Dewey, supra,* rejects the notion that by engaging in a "closely regulated industry", a businessman "in effect" consents to warrantless inspections. *See,* 1 LaFave and Israel, Criminal Procedure, § 3.9(c). Rather, an analysis must be made of the particular regulatory scheme under the balancing test of *Camara v. Municipal Court,* 387 U.S. 523, *supra, i.e.* balancing the need to search against the invasion which the search entails, during which another form of "implied consent", that businessmen consent to entry by the general public to public parts of their business during regular business hours, is properly taken into account. *Ibid.*

The automobile parts industry and secondhand dealers have, of course, been subject to regulation. But that regulation has been no different than numerous other commercial enterprises. They have never been subjected to the type of close scrutiny such as the firearms or liquor industry.

Nor have such enterprises been completely opened to the public, which would diminish a proprietor's right of privacy in non-public areas. A warrant requirement would



not place undue burdens upon the state and would prevent generalized searches conducted at the whim of law enforcement officials whenever and wherever they decided. It would prevent the harassment of legitimate businessmen by police officers, a problem which, unfortunately, has been identified by various New York State investigative commissions. *See, e.g.* Report of the New York Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedure (The Knapp Commission), August 3, 1972.

To hold the automobile parts and secondhand dealers industries to be on a par with the liquor and firearms industries could swallow up the exception and turn *Colonnade* and *Biswell* into the general rule. The Court declined to take that step in *Marshall v. Barlow's, Inc., supra,* and it should decline to take that step now.

## II. THE STATUTES AT ISSUE DO NOT PROVIDE AN ADEQUATE SUBSTITUTE FOR A WARRANT.

Neither New York City Charter § 436 nor New York Vehicle and Traffic Law § 415-a provide "an adequate substitute for a warrant in terms of the certainty and regularity of its application". *Donovan v. Dewey,* 452 U.S. 594, 603 (1982). The statutes do not "define clearly what is to be searched, who can be searched, and the frequency of such searches". *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072, 1077 (7th Cir. 1983). Neither statute limits the discretion of the police officers undertaking the warrantless searches in any respect.

Professor LaFave, in his treatise, 2 LaFave, Search and Seizure, § 10.2(f), at 236-237, offers a useful discus-

sion that concerns the various methods by which limitation in scope can be achieved:

> "One is a careful statement in the legislative or administrative standards as to precisely what things may be examined, such as certain types of records. Another is a careful statement of the limited purposes of the inspection program, which might be taken to convey to the inspector an understanding as to where he should look in order to accomplish those purposes. Also, it would seem that existing scope limitations would be entitled to somewhat greater weight where by law the inspections may be conducted only by specialized inspectors who could be expected to understand and adhere to the stated scope limitations, rather than by any law enforcement officer."

The New York statutes under review contain none of these safeguards. Rather, as the New York Court of Appeals held, they simply authorize general police exploratory searches.

First, like the statutory scheme held overly broad in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323-24, nn. 21-22 (1978), the statutes under review permit police officers to roam at will throughout the business premises. *See, e.g. Bionic Auto Parts & Sales v. Fahner*, 721 F.2d at 1080, *supra* (sustaining Illinois statute which "delineates specifically what is to be searched"); *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682, 684-685 (2d Cir.) (Friendly, J.), *cert. denied*, 419 U.S. 875 (1974).

Second, unlike the statute sustained in *Bionic Auto Parts & Sales v. Fahner, supra*, at 1080, the statutes here do not describe how searches are to be conducted and do not limit the temporal duration of the search. Indeed, the New York City Charter does not even limit the ability to search to reasonable business hours. It simply provides



that police officers, as the delegates of the police commissioner "in connection with the performance of *any* police duties * * *, have the power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession". New York City Charter § 436. (emphasis supplied)

Petitioner's claim that "The New York City Administrative Code limits that authority to inspections conducted at 'reasonable times' ", citing *People v. Pace*, 111 Misc. 2d 488, 491, 444 N.Y.S.2d 529, 531 (Sup. Ct. 1981), *revd.* 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dept. 1984), *affd.* 65 N.Y.2d 684, 481 N.E.2d 250 (1985), Pet. Br. p.22, is disingenuous at best. Rather, the trial judge in *Pace* misread the statute.

Even the dissenters of the Appellate Division rejected the argument—made by the same District Attorney's office—that the Administrative Code provisions modified the charter. As Justice Mangano observed for himself and Justice Weinstein in dissent:

> "The People argue that subdivision d of section B32-132.0 of the Administrative Code of the City of New York provides that administrative searches are to be conducted during 'all reasonable times'. However, a review of the language of that section indicates that it speaks only with regard to the inspection of a certain record book which is required to be kept by every dealer in secondhand articles and does not speak at all about administrative searches and inspections of merchandise or inventory."

101 A.D.2d at 347, n.2, 475 N.Y.S.2d at 450.[2]

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[2]It is evident that the majority was of the same view. 101 A.D.2d at 339, n.2, 475 N.Y.S.2d at 445, n.2.

In short, New York City Charter § 436 permits general searches at any time, without limitation. For that reason alone, it is violative of the Fourth Amendment. *See, e.g. Hodge v. Hedrick,* 391 F.Supp. 91 (E.D. Va. 1974); *Washington Message Foundation v. Nelson,* 87 Wash.2d 948, 558 P.2d 231 (1976); 2 LaFave, Search and Seizure, *op. cit.,* § 10.21(f), at 237; *cf. Wayne Consumarro, Inc. v. Blick,* 692 F.2d 1025, 1028-1029 (5th Cir. 1982) (approving warrantless searches limited to ordinary business hours).

Although New York Vehicle and Traffic Law § 415-a does limit inspections to "regular and usual business hours", this does not suffice. The statute construed in *Marshall v. Barlow's, Inc., supra,* permitted administrative searches to be performed only "at . . . reasonable times, and within reasonable limits and in a reasonable manner", 29 U.S.C. § 657(a). The regulations promulgated echoed the statutory language. 29 CFR § 1903.3 (1977). Yet, the Court invalidated the scheme because it devolved "almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search". 436 U.S., at 323.

Finally, neither of the statutes limit the number of inspections that may be conducted within any given period. Police officers are permitted to conduct daily warrantless searches, if they so desire. *Cf. Bionic Auto Parts & Sales v. Fahner,* 721 F.2d at 1080, *supra* (no more than six inspections during six month period).

Thus, the statutes under review delegate to police officers in the field "almost unbridled discretion * * * as to when to search and whom to search". *Marshall v. Barlow's, Inc.,* 436 U.S. at 307, *supra.* Petitioner has not identified any "administrative plan containing specific neutral criteria". *Ibid.*



*United States v. Biswell, supra,* upon which petitioner places almost total reliance, is pointedly different. The Court recognized as much in *Donovan v. Dewey, supra,* when, after detailing the time, manner and frequency of inspections limited by the statute and regulations promulgated thereunder, wrote:

> "Thus, rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence. Like the gun dealer in *Biswell,* the operator of a mine 'is not left to wonder about the purposes of the inspector or the limits of his task.' 406 U.S., at 316.
>
> "Finally, the Act provides a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have. The Act prohibits forcible entries, and instead requires the Secretary, when refused entry onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals. 30 U.S.C. § 818(a) (1976 ed., Supp. III). This proceeding provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mineowner might have. See, e.g., *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d 589, 594 (CA3 1979) (inspectors ordered to keep confidential mine's trade secrets), cert. denied, 444 U.S. 1015 (1980)."

452 U.S. at 604-605.

In marked contrast to *Biswell,* businessmen governed by the provisions of New York City Charter § 436 and New

York Vehicle and Traffic Law § 415-a are "left to wonder about the purposes of the inspector [and] the limits of his task". 406 U.S., at 316.[3] This is particularly acute where, as here, the search is conducted by the police, rather than administrative agents, because "police have general criminal investigative duties which exceed the legitimate scope and purposes of purely administrative inspections". *Commonwealth v. Lipomi*, 385 Mass. 370, 432 N.E.2d 86, 91 (1982). The failure of the State of New York to place careful limitations on the time, manner and frequency of warrantless inspections render New York City Charter § 436 and New York Vehicle and Traffic Law § 415-a unconstitutional.

## III. THE STATUTES AT ISSUE ARE NOT ADMINISTRATIVE IN NATURE.

Warrantless administrative inspections have been sustained because the purpose of the inspection is to insure compliance with an administrative scheme rather than to unearth evidence of criminal activity. It is basic that absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant. *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980); *Johnson v. United States*, 333 U.S. 10 (1948). And this Court

[3]Indeed, the regulations promulgated by the Secretary of the Treasury under the Gun Control Act are quite detailed, consisting of 149 parts. 27 CFR, part 178, §§ 178.1-178.149 (1986). The inspections can only be undertaken by an Alcohol, Tobacco and Firearms officer, during business hours, and the inspection itself limited to specified items and areas which comport with the administrative scheme. 27 CFR § 178.23 (1986). *See also, Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986) (similar limitations) under Magnuson Act, 16 U.S.C. § 1801 *et seq.*



has held that "these same restrictions pertain when commercial property is searched for contraband or evidence of crime". *Donovan v. Dewey*, 452 U.S. 594, 598, n.6 (1981), citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-359 (1977). As then Justice Rehnquist observed in the course of his concurring opinion in that case, *id.* at 608:

> "I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining."

In this case, New York City Charter § 436 explicitly permits police officers to search commercial property, at any time, "in connection with the performance of *any* police duties" (emphasis supplied).[4] Although New York Vehicle & Traffic Law § 415-a does have some administrative aspects to it, the searches it authorizes are not related to an administrative scheme. As Police Officer Vega testified at the suppression hearing, and the Court of Appeals found, "the ensuing search was undertaken solely to dis-

[4]In this regard, it is significant to note that, in this case, Police Officer John Vega admitted during his suppression hearing testimony that neither of the two administrative agencies that would have had an interest in the enforcement of these statutes (or, for that matter, any other administrative agency) was contacted by the police before the so-called administrative inspection was conducted.

cover whether defendant was storing stolen property on his premises", not to ascertain whether there had been compliance with any regulatory scheme. 67 N.Y.2d at 345, 493 N.E.2d at 930. Indeed, the Court of Appeals quoted petitioner's concession in its brief, "that 'the immediate purpose of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property' " *ibid.* That concession is repeated here. Pet. Br., p.30.

Nonetheless, petitioner urges that the criminal aspect of the search is of no moment, so long as it can point to some purported administrative purpose, however tangential. Once again, it hinges its argument to *United States v. Biswell,* 406 U.S. 311 (1972), and once again that reliance is misplaced.

In *Biswell,* this Court upheld warrantless inspections of firearms dealers which were conducted pursuant to the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* Significantly, the inspection was conducted by an agent of the regulatory agency, not a police officer, in order to ascertain whether there had been compliance with the licensing, record-keeping and occupational tax requirements of that statute. Indeed, the right to inspect is expressly limited to Alcohol, Tobacco and Firearms agents by regulation 27 CFR § 178.23 (1986). So, too, in *Donovan v. Dewey, supra,* and *Colonnade Catering Corp. v. United States, supra,* other instances in which warrantless inspection schemes were upheld, the searches were conducted to insure compliance with administrative purposes, not to search for evidence of crime, and the searches were conducted by administrative agents. Further, the administrative agents reported back to an administrative agency, not to the police.



The fact that police officers, rather than administrative agents, conduct the warrantless searches, and are not under the aegis of any administrative agency, cannot be lightly brushed aside. As the Supreme Judicial Court of Massachusetts has observed, "[s]earches by the police are inherently more intrusive than purely administrative inspections. Moreover, unlike administrative agents, the police have general criminal investigative duties which exceed the legitimate scope and purposes of purely administrative inspections". *Commonwealth v. Lipomi,* 385 Mass. 370, 432 N.E.2d 86, 91 (1982); *see also, Commonwealth v. Frodyma,* 386 Mass. 434, 436 N.E.2d 925 (1982); *State v. Williams,* 84 N.J. 217, 227, 417 A.2d 1046, 1050 (1980); *United States v. Russo,* 517 F. Supp. 158 (D.Md. 1980); *United States v. Anile,* 352 F. Supp. 14 (N.D. W.Va. 1973); *State v. Sidebotham,* 124 N.H. 682, 474 A.2d 1377 (1984).

Thus, in sustaining the New York statute authorizing the inspections of druggists' narcotic records, Judge Friendly took pains to emphasize that the statute had been amended "to restrict the right of inspection to representatives of the Health Department, * * * rather than 'all peace officers within the state' ". *United States ex rel. Terraciano v. Montanye,* 493 F.2d 682, 685 (2d Cir.), *cert. denied,* 419 U.S. 875 (1974); *see also,* 2 LaFave, Search & Seizure, *op. cit.,* § 10.2(f) at 237.

Indeed, petitioner can point to no case in which this Court has sustained an administrative warrantless search made by a police officer where, in the words of the New York Court of Appeals, the "asserted 'administrative schemes' * * * are, in reality, designed to give the police

an expedient means of enforcing penal sanctions for possession of stolen property".[5] 67 N.Y.2d at 344, 493 N.E.2d at 929. Nor is there room for argument that this is an oversight.

A criminal statute authorizing unannounced, warrantless searches of property reasonably believed to contain unlawful narcotics activity would doubtless violate the Fourth Amendment, irrespective of the public interest in regulating and preventing drug-related crime and irrespective of any administrative bookkeeping regulatory requirement attached to such a statute. *See, Donovan v. Dewey,* 452 U.S. at 608, *supra* (Rehnquist, J., concurring in the judgment). Yet, as the New York Court of Appeals found, and petitioner has effectively conceded, both in the New

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[5]It should be noted that the statutes at issue have been the subject of abuse, having been employed to justify pretext searches for evidence of crime, e.g., *People v. Pace,* 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dept. 1984), *affd.* 65 N.Y.2d 684, 481 N.E.2d 250 (1985); *People v. Camme,* NYLJ, Nov. 2, 1981, p.16, col.2; *People v. Sullivan,* 129 Misc.2d 747, 493 N.Y.S.2d 932 (Sup.Ct. Queens Co. 1985), *affd.* — AD2d —, — N.Y.S.2d — (2d Dept. 1986), and, routinely, as a way to avoid having to make an application for a search warrant. See, *People v. Salamino,* 107 A.D.2d 827, 484 N.Y.S.2d 666 (2d Dept. 1985); *People v. Robles,* 124 Misc.2d 419, 477 N.Y.S.2d 567 (Sup.Ct. Kings Co. 1984); *People v. Leto,* 124 Misc.2d 549, 478 N.Y.S.2d 765 (Sup.Ct. Queens Co. 1984); *People v. Ost,* 127 Misc.2d 183, 485 N.Y.S.2d 483 (Sup.Ct. Queens Co. 1985), *affd.* — A.D.2d —, 503 N.Y.S.2d 620 (2d Dept. 1986); *People v. Martinelli,* 117 Misc.2d 310, 458 N.Y.S.2d 785 (Sup.Ct. Kings Co. 1982); *Mubarez v. State,* 115 Misc.2d 57, 453 N.Y.S.2d 549 (Ct.Cl. 1982); *People v. Camme,* 112 Misc.2d 792, 447 N.Y.S.2d 621 (Sup.Ct. Queens Co. 1982); *People v. Ruggieri,* 102 Misc.2d 238, 423 N.Y.S.2d 108 (Sup.Ct. Kings Co. 1979); *People v. Tinneny,* 99 Misc.2d 962, 417 N.Y.S.2d 840 (Sup.Ct. Kings Co. 1979); *People v. Kelly Freedman & Son, Inc.,* 95 Misc. 2d 564, 407 N.Y.S.2d 963 (Albany Co.Ct. 1978).



York Court of Appeals and in this Court, that is precisely how the statutes under review here operate. The holding of the New York Court of Appeals is correct and should be affirmed.

## CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

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